NO. 89-1237

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GOGOLIN + STELTER,
Petitioner

v.

FIRST CITY BANK, BELLAIRE, N.A.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a civil action against multiple defendants all residing in a single district, can 28 U.S.C. § 1392(a) be utilized to sustain venue in another district of the same state where only one of the defendants also resides?

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To The Honorable Chief Justice And Justices of the Supreme Court of the United States:

Respondent opposes the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 886 F.2d 100 (5th Cir. 1989) and is accurately reproduced in the appendix to the Petition for Writ of Certiorari at *a*. The judgment of the United States District Court for the Eastern District of Texas is unreported and is accurately reproduced in the appendix to the Petition for Writ of Certiorari at *m*.

The judgment of the United States Court of Appeals for the Fifth Circuit is accurately reproduced in the appendix to the Petition for Writ of Certiorari at *p.*

JURISDICTION

This Court has jurisdiction to review the judgment of the Fifth Circuit Court Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1392. Defendants or property in different districts in same State.

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

REASONS FOR DENYING THE WRIT

The decision of the Fifth Circuit Court of Appeals is correct and does not warrant review by this Court.

1. The Fifth Circuit's construction of 28 U.S.C. § 1392(a) is consistent with both the literal language of the statute and its underlying purpose. By its own terms, the statute applies only to a civil action against "defendants residing in different districts in the same state." 886 F.2d at 104. The Fifth Circuit properly concluded that defendants who reside in a single district in the same state are not "defendants residing in different districts in the same State." Professor Charles Allen Wright, cited by Petitioner on numerous occasions in the Petition for Writ of Certiorari, agrees that "[t]he language of § 1392(a) lends some support to the view that it does not apply" to a case where all defendants are residents of a single

district in the state. C. Wright, FEDERAL COURTS § 42 at 246 (4th ed. 1983). In holding that 28 U.S.C. § 1392(a) does not apply if all defendants reside in a single district, the Fifth Circuit complied with its obligation, as set out in *Pavelic & LeFlore v. Marvel Entertainment Group*, ____U.S.____, 110 S.Ct. 456, 460 (1989), "to apply the text" of the statute.

The Fifth Circuit's construction of § 1392(a) also is consistent with the statute's underlying policy. As stated by Professor Wright, "the evident purpose of § 1392(a) . . . is to permit a single suit in a situation where two suits would otherwise be required." C. Wright, FEDERAL COURTS § 42 at 246 (4th ed. 1983). As the Fifth Circuit concluded, if all of the defendants reside in a single district, there is no point in permitting a plaintiff to avail itself of an additional district of venue. 886 F.2d at 104. The strained construction urged by Petitioner would permit the plaintiff in this case to file its suit in the Amarillo Division of the Northern District of Texas, which is hundreds of miles from Houston, where all of the defendants have their residence and principal place of business and where venue could be sustained under 28 U.S.C. § 1391, the general venue statute. The Fifth Circuit's construction of § 1392(a) is consistent with its language and purpose and avoids the absurd results which would occur if Petitioner's construction was adopted.

2. Contrary to the implication of the Petition for Writ of Certiorari, there is no division among the United States Courts of Appeal on the issue presented in this case. The two U.S. Court of Appeals decisions cited by Petitioner, *Board of County Commissioners v. Wilshire Oil Co.*, 523 F.2d 125 (10th Cir. 1975) and *Vance Trucking*

Co. v. Canal Insurance Co., 338 F.2d 943 (4th Cir. 1964), did not involve a situation where all defendants resided in a single district in a state while less than all of the defendants also resided in the district where the suit was brought. In the *Wilshire Oil* case, there was no suggestion that all of the defendants resided in a single district. In *Vance Trucking*, the two corporate defendants were both South Carolina corporations, one doing business in the Eastern District of South Carolina and the other doing business in the Western District of South Carolina. The court found it unnecessary to decide whether the corporations' status as South Carolina corporations made both of the corporations residents of all districts in South Carolina, holding that if the corporations were only residents of the Eastern District and the Western District respectively, venue would be proper under § 1392(a). The court did not hold that § 1392(a) can apply even if all of the defendants reside in a single district.

In short, there is no division of authority among the Courts of Appeals on the issue presented. The Fifth Circuit's decision in this case represents the only Court of Appeals decision addressing this issue, and as noted above, it correctly resolved the issue.

3. Respondent acknowledges that there is some division of authority among the federal district courts on the applicability of § 1392(a) to the factual situation involved in this case. However, Respondent respectfully submits that the trend of the more recent cases is toward the construction given the statute by the Fifth Circuit in this case.

Although Petitioner cites many district court decisions which Petitioner claims support its position, only five cases cited by Petitioner have held that § 1392(a) applies to a situation where all defendants reside in a single district. One of the cases is out of the Southern District of New York, *PI, Inc. v. Valcour Imprinted Papers, Inc.*, 465 F. Supp. 1218 (S.D.N.Y. 1979), three are out of the district courts of Pennsylvania, *Hawkins v. National Basketball Association*, 288 F. Supp. 614 (W.D. Pa. 1968), *De George v. Mandata Poultry Co.*, 196 F. Supp. 192 (E.D. Pa. 1961), and *Minter v. Fowler & Williams, Inc.*, 194 F. Supp. 660 (E.D. Pa. 1961), and one is out of the Western District of Missouri, *Jackson v. Phelps Regional Medical Center*, 702 F. Supp. 235 (W.D. Mo. 1988).

Subsequent to the decision by the New York court in *PI, Inc.*, other district courts in New York have rejected the rationale of that case and adopted the construction of § 1392(a) utilized by the Fifth Circuit in this case. *See Andrew H. v. Ambach*, 579 F. Supp. 85 (S.D.N.Y. 1984); *Canaday v. Koch*, 598 F. Supp. 1139 (E.D.N.Y. 1984). Similarly, the most recent decision out of Pennsylvania rejected the prior Pennsylvania decisions and adopted the approach utilized by the Fifth Circuit in holding that § 1392(a) does not apply if all of the defendants reside in a single district. *Mazzella v. Stineman*, 472 F. Supp. 432 (E.D. Pa. 1979). The decision of the Western District of Missouri in *Jackson* cites no authority in support of its conclusion and represents an aberration from the current trend of decisions of the federal courts.

CONCLUSION

As noted by the Fifth Circuit in its opinion, 28 U.S.C. § 1392(a) is "a little-used provision." Although the statute in one form or another has been in place since the 1800's, only a handful of cases have addressed its applicability to a situation where all defendants reside in a single district, the fact situation presented in this case. There is no split among the circuits in the resolution of the issue presented in this case, and the trend of federal court decisions is toward the construction given the statute by the Fifth Circuit in this case. The Fifth Circuit's construction is consistent with both the language of the statute and its underlying purpose. For all of these reasons, the decision of the Fifth Circuit does not warrant review by this Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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